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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1540 of 1995

with

SPECIAL CIVIL APPLICATION No 9247 of 1995

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SB GALIYEL

Versus

STATE OF GUJARAT

Appearance:

Mr. G.M.Joshi for Mr. Girish Patel for the petitioners.

Mr. V.B.Gharaniya,Asstt.GP for the Respondents.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 24/06/97

ORAL JUDGEMENT

The petitioners in both these petitions are Sub

Inspectors serving under the Director of Prohibition and Excise Respondent No. 1 herein. Petitioner in Special Civil Application No. 1540 of 1995 was appointed as Constable on 1st July, 1969 and in the month of December, 1979, he was promoted as Junior Clerk. On 20th January, 1989, said petitioner was promoted as Sub Inspector with effect from 4th November, 1988. The petitioner in Special Civil Application No. 9247 of 1995 was appointed as a constable on 16th June, 1963 and was promoted as Sub Inspector on 2nd January, 1989. At the relevant time, the Rules for Departmental Examination of non-gazetted Prohibition and Excise Officers and clerks of the Prohibition and Excise Department [hereinafter referred to as "the 1965 Rules"] were in force. Rule 2 of the said rules provides inter alia that every person appointed to the clerical and non-gazetted executive service as inspector or sub inspector of prohibition and excise department shall, unless specially exempted by the Government, be required to pass an examination in the subjects mentioned in rule 4 within two chances during the period of three years from the date of his promotion or appointment [four years in the case of scheduled tribe, scheduled caste and other backward class persons]. The first proviso to the said rules empowers the Government to give one additional chance to appear in the departmental examination to a person who fails to pass the examination within the period specified in the said rule. It further provides that no more chances shall be given to any person under any circumstances. Rule 3 provides that in case a person fails to pass the examination within number of chances allowed to him under rule 2 shall be reverted if he is a departmental promotee and discharged from service if he was appointed by nomination. Rule 4 of the said rules provides, inter alia, that if the person promoted or appointed to the executive service of prohibition and excise department fails to pass the examination within the period specified in rule 2, he shall be liable to have increments falling due after the completion of the said period within which he should have passed the examination, withheld until he passes the examination at a subsequent chance, if any, given to him or until he is reverted or his services are dispensed with. Rule 5 provides for determination of seniority amongst non-gazetted prohibition and excise officers and clerks for the purpose of confirmation and promotion.

2. It is undisputed that both the petitioners having been promoted as Sub Inspectors of prohibition and excise were required to pass the departmental examination specified under the 1965 Rules. The petitioner in

special civil application no. 9247 of 1995 being a scheduled caste employee, was required to pass the said examination within four years from the date of his promotion. Both the petitioners availed of two chances within specified period. However, failed to pass the examination. Both the said petitioners were also given an additional chance to appear at the said examination, however failed. It would be pertinent to note here that both the petitioners earned exemption in one of the papers at their second attempt, however, failed to pass the examination. In view of the above-referred proviso to rule-2, neither of the petitioners could have been given more than one additional chance. Thus, both the petitioners were liable to be reverted to their substantive posts of clerk and constable respectively in view of the provisions contained in rule 3 of the 1965 Rules and were also liable to forfeit their right to increments since the expiry of the period within which they were required to pass the said examination. Promotion of both the petitioners were temporary in nature i.e. neither of the petitioners was granted regular/permanent promotion as sub inspector. It would not be out of place to mention here that both the petitioners were permitted to take more than three chances under the 1965 Rules quite contrary to the first proviso to rule-2 of the said Rules.

3. On 23rd December, 1992, the Government issued a Notification and framed the rules known as the Prohibition and Excise Department [Conditions of Service Relating to Sub Inspectors] Departmental Examination Rules, 1992 [hereinafter referred to as "the 1992 Rules"]. Said Rules have been framed in supersession of all the existing rules made in that behalf. Under rule-3 of the said rules, the same have been made applicable to the persons appointed as Sub Inspectors in the Prohibition and Excise Department whether by promotion or otherwise. Second proviso to sub rule 3 of rule 1 provides that where any person has before the commencement of the said rules exhausted all the chances prescribed under the old rules for passing the examination and has accordingly failed to pass the examination, nothing in the said rules, save as expressly provided therein, shall entitle him to appear in the examination as provided in the said rules. Rule 2(g) defines old rules to mean the rules for the departmental examination of the non-gazetted prohibiton and excise officer and clerks of the prohibition and excise department prescribed under the Government Notification dated 8th July, 1965 [i.e. the 1965 Rules]. Rule 4(3) provides that if a direct recruit fails to pass the examination within the specified period

and specified chances under the said Rules, his service shall be terminated. Rule 5 provides that the increments of the person promoted or appointed as a sub inspector shall not be withheld for failure to pass the examination and if in case of such person his increments, if any, were withheld before the appointed date for failure to pass the examination under the old Rules, they shall be released with effect from the commencement of the said rules [i.e. 1992 Rules].

4. After coming into force of the 1992 Rules, both the petitioners were permitted to take two chances to pass the examination under the 1992 Rules. However, both of them have failed to pass the examination. Both the petitioners having failed to pass the departmental examination, have been reverted to their substantive posts of clerk and constable respectively.

5. Learned advocate Mr. Joshi appearing for the petitioners has submitted that nothing in the 1992 rules empowers the respondents either to withhold the increments or to revert the sub inspectors who have been promoted as such on account of their failure to pass the departmental examination. He has further submitted that in absence of any specific provision empowering the respondents to revert such sub inspectors, reversion of the petitioners is vitiated and requires to be quashed and set aside. In support of his contention, he has relied upon the judgment of the Honourable Supreme Court in the matter of State of Karnataka and Anr. versus B.V.Thimmappa [1994 Supp. (1) SCC 124]. In the said matter, the Court has held that in absence of any specific provision, the appointing authority cannot revert the person concerned to his substantive post for want of passing the departmental examination.

6. In the present case, it is undisputed that both the petitioners were required to pass the departmental examination prescribed under the 1965 Rules within the specified period and specified chances which both have failed to do. The petitioners have failed to pass the said departmental examination even after availing two additional chances. Both the petitioners were promoted as Sub Inspectors on temporary basis. In my view, the petitioners have no right to continue on the promotional post on the basis of their temporary promotion made in the year 1988 and 1989. Further, the petitioners had forfeited their right to promotion by failing to pass the departmental examination prescribed under the 1965 Rules within the specified period and specified chances and

additional chance permissible under the said Rules. The petitioners had, thus, become liable to be reverted to their substantive posts from the post of Sub Inspector long before the 1992 Rules came into force. If the petitioners were continued on the promotional post even after they had become liable to be reverted, such continuance in the promotional post should be treated as fortuitous and would not create any right to promotional posts unto either of the petitioners. Besides, under the second proviso to rule 3 of the above referred 1992 Rules, the petitioners were not entitled to appear in the examination prescribed under the said Rules. However, inspite of this express bar imposed under the said provision, the petitioners were given two chances to appear in the examination under the 1992 Rules. In my opinion, grant of additional chances under the 1992 Rules to the petitioners was contrary to the above referred Proviso and no right to promotional post can be created unto the petitioners by such additional chances availed of by them under the 1992 Rules. In view of the above facts, the petitioners were liable to be reverted from the post of Sub Inspector to their substantive posts long before 1992 Rules came into force and the said orders have now been made after long delay in the year 1995. Neither the petitioners can be said to have been promoted after the 1992 Rules became effective nor can they be said to have been reverted under any of the provisions of the 1992 Rules. I am, therefore, of the opinion that the reversion of the petitioners to their substantive posts is valid and is made in consonance with the rules i.e. 1965 Rules.

7. Since I have held that the petitioners were not entitled to appear in the examination under the 1992 Rules, their claim for extension of benefit of exemption earned by them under the 1965 Rules becomes insignificant and need not be decided. The petitioners' appearing at the departmental examination under the 1992 Rules is of no consequence and no benefit can accrue to the petitioners by the said chances availed of by the petitioners.

8. In view of the above discussion, both the petitions fail. Petitions are dismissed. Rule is discharged in both the petitions. There shall be no order as to costs.

24.06.1997. *****

*Vyas